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IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, **Plaintiff,** **v.** **STEVEN C. DeMOCKER,** **Defendant.**	**CR 2008-1339** **Division 6** **STATE'S RESPONSE TO DEFENDANT'S MOTION FOR NEW FINDING OF PROBABLE CAUSE**

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned respectfully submits its Response to Defendant's Motion for New Finding of Probable Cause and requests Defendant's Motion be denied for the reasons given in the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

LEGAL ARGUMENT:

The role of the grand jury is to determine whether probable cause exists to believe that a crime has been committed and that the person being investigated committed it. *State v. Sanchez,* 165 Ariz. 164, 171, 797 P.2d 703, 710 (App. 1990). Expanding the grand jury's role beyond that point would put grand juries in the business of holding mini-trials. *State v. Baumann,* 125 Ariz. 404, 408-409, 610 P.2d 38, 42-43 (1980). "To do its job effectively, the grand jury must receive a fair and impartial presentation of the evidence." *Maretick v.*

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Jarrett, 204 Ariz. 194, 197, 62 P.3d 120, 123 (2003) (citations omitted). A challenge may not be made based on the nature, weight or sufficiency of the evidence considered by the grand jury; such a challenge is beyond the scope of judicial inquiry. *Crimmins v. Superior Court, In and For Maricopa County*, 137 Ariz. 39, 42-43, 668 P.2d 882, 885-86 (1983); *State v. Guerrero*, 119 Ariz. 273, 276, 580 P.2d 734, 737 (App. Div. 2 1978). Grand jury proceedings can be challenged "only by motion for a new finding of probable cause alleging that defendant was denied a substantial procedural right, or that an insufficient number of qualified grand jurors concurred in the finding of the indictment." Rule 12.9, *Arizona Rules of Criminal Procedure.*

I. The witnesses provided fair and accurate evidence against Defendant. Although a few inconsistencies exist, they are not so grave or unfairly prejudicial as to warrant remand.

In his Motion for New Finding of Probable Cause, Defendant challenges nearly every piece of evidence presented to the grand jury. Defendant's claims are frivolous and the few minor misstatements that were made were not deliberate or malicious, are harmless, and do not merit remand. As to Defendant's claim that the county attorney failed to correct the misstatements or failed to elicit additional testimony to clarify certain issues; the county attorney's knowledge was based upon the same information given to the jurors. The county attorney was unaware that any misstatements had been made. Defendant's challenges should be rejected and his request for remand should be denied.

A. Spousal support payments, on-line dating service, date of arrest, and the State's theories.

The State grants that a few misstatements were given to the grand jury. The most noticeable is the date of arrest which was October 23, 2008. The transcript gives the date of arrest as August 24, 2008. The State believes that the error was a misunderstanding on the

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part of the court reported but acknowledges that it could be a shared mistake. There is no doubt that had the county attorney heard such a glaring error as an incorrect arrest date, he would have sought to correct it. While giving testimony before this Court at Defendant's release hearing, Detective McDermott stated he was sure he gave the correct month of Defendant's arrest but conceded that he may have said it was the 24th rather than the 23rd. Regardless, the error was not purposeful, does not unfairly prejudice Defendant, and is not of such importance that it would warrant remand.

Carol and Defendant's divorce was final on May 28, 2008. The decree ordered Defendant to pay $6,000 a month spousal support. Detective McDermott told the grand jury that the first payment was due on July 1st and that Carol had not received that payment. This statement is only partially accurate but was based upon the facts as Detective McDermott understood them. Detectives learned that the first spousal support payment had been made in June but Carol had not received the 2nd payment which was due July 1st. Detective McDermott acknowledged and corrected this error before this Court during the release hearing. This misstatement is not unduly prejudicial and is not a denial of a substantial procedural right.

Detective McDormett also informed the grand jury that Defendant lead an extravagant lifestyle, had several girlfriends, and used an escort service. Law enforcement discovered that at the time of Carol's death, Defendant was personally involved with at least four different women: Carol – Defendant stated they had spoken of reconciling only days before her death; Renee Girard – Defendant's Prescott love interest; Barbara O'non – Defendant's co-worker and love interest in Phoenix, and another woman in California. The fact that he had so many active relationships at that time undermines Defendant's statements

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that he loved Carol or that he was seriously considering reconciliation. The information was given to demonstrate that the attempt to reconcile with Carol was either a ruse to avoid support payments or part of an "I couldn't kill her, I loved her" defense.

Law enforcement found reoccurring charges on Defendant's American Express credit card for a company called Great Expectation. The description on the statement reads "dating/escort servi[ce]." During his grand jury testimony, Detective McDormett stated Defendant used an escort service, referring to the membership in Great Expectations. Further investigation has revealed that Great Expectations is a reputable on-line dating service. This was evidenced by a compliant against Defendant that he lied about his marital status on his personal profile. Well before his divorce was final, Defendant held himself out as a single man and one of the women he dated complained when she learned the truth. Because the charge was defined on the statement as fees for dating/escort services, the use of the phrase "escort service" was not false or misleading and is not unduly prejudicial in light of the other evidence presented to the grand jury.

Defendant claims the State violated his due process rights when if failed to inform the grand jury that Carol had had more than one personal relation during the five year period preceding the final decree. One juror asked, "Did Carol have any other relationships?" (GJ 65:19-20) Detective McDormett answered that at the time of her death, Carol had a boyfriend who had been in Maine for several months. This was a direct answer to the juror's question. In fact, law enforcement had spoken to the few men Carol had dated since her separation from Defendant and found that while most remained on friendly terms with Carol, the extent of the relationships was an occasional friendly email or telephone call. Defendant's claim that the State's failure to mention Carol's other relationships violated his

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due process rights is meritless.

Defendant's extravagant lifestyle is relevant to his motive. Defendant had excessive debt yet he continued to spend as though he had none. In a communication to Carol in late March 2008, Defendant complained he received no pay one month and his pay the next was not enough to cover the mortgage. A quick scan of Defendant's credit card statements reveals he continued to spend thousands of dollars at upscale department stores, salons, restaurants, and resorts, often spending several hundred dollars a month at The Phoenician, a resort in the Valley. In an email to Carol on June 1, 2008, Defendant claimed he was out of money and was borrowing $20,000 a month from his father to stay solvent. Barbara O'non told law enforcement that Defendant borrowed $60,000 from his father.

It is believed that Defendant gave false information on prior income tax forms and on the financial affidavit provided to the court during the divorce proceedings. These transgressions, the uncontrolled debt, tax fraud, and perjury before the court, if proven true, certainly would have had a significantly negative effect on Defendant's professional standings and could have cost him his job. After the presentation regarding financial motive, one juror stated, "I'm uncomfortable with this." (GJ 57:6) The witness reiterated the facts and theories and after the detailed explanation, the juror stated, "That's fine. I'm satisfied." (GJ 58:25). While the investigation on these issues is ongoing, the preliminary findings reveal an extended financial motive for Defendant to kill Carol.

Defendant's liquid assets were drastically reduced in the divorce and his future financial obligation to Carol was substantial. It was reported that one of Defendant's greatest complaints about Carol during the divorce was that she was asking for too much and that his and his daughter's lifestyle would be negatively affected as a result. This became a wedge

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between Carol and her youngest daughter, Charlotte, who moved in with Defendant when the divorce settlement negotiations became increasingly belligerent.

To Defendant's divorce attorney's credit, most of community debt was assigned to Carol in the decree. Although Carol received a sizable amount of money from Defendant's 401K account, it was not enough to cover the significant debt the two had accumulated. It is a fact that Defendant's responsibility for that debt ended with the divorce. Although Defendant claims Carol owed him money when she died; there is contradictory evidence that Defendant's obligation to Carol that month actually exceeded $8,000. It is a fact that Defendant's financial obligation to Carol ended with her death. By killing Carol, Defendant gained freedom both his financial obligation and perhaps professional disgrace.

B. Life insurance policies.

Defendant claims he contacted the life insurance company to tell them he did not want to receive the proceeds. This statement is incorrect. A person from the Prescott UBS office made the contact, not Defendant himself. Even if the life insurance policies had not been paid directly Defendant but to his daughters, he still stood to benefit greatly from the funds. Defendant worked as a financial advisor and neither daughter was totally "on their own." Katherine was 20 years old and Charlotte was just 16. Had he not been implicated in Carol's murder, there is little likelihood that either daughter would have denied him access to use and invest the funds as he saw fit.

C. Weather Conditions.

Defendant states that Detective McDormett gave false information to the grand jury regarding whether conditions the day of Carol's murder. Detective McDormett testified that he had been told that it had rained earlier that day. This information was reportedly given to

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other officers by Carol's neighbors. Defendant offers an online weather source to show it did not rain on July 2nd but did rain on July 1st. In contrast, The Old Farmer's Almanac website, available at http://www.almanac.com, gives just the opposite information, that there was no rain on July 1st but a trace amount fell on July 2nd.

As anyone who is familiar with weather patterns in Arizona knows, summer rainfall is very unpredictable and the intermittent showers that precede monsoon season are even more so. The local saying that it can rain on one side of the street and not the other is not an exaggeration as one area will often be drenched yet another nearby will be absolutely dry. More to the point, the exact time that the rain fell was not critical to the grand jury's finding of probable cause. Defendant's request for remand on this issue should be denied.

D. Tracks.

Detective McDormett gave testimony to the grand jury regarding tracks found behind Carol's home. Due to the recent rain, the area behind the home was relatively free of footprints. Detective Kennedy was able to distinguish two sets of tracks. One set was identified as Carol's. She had been seen running on a trail behind her house just hours before she was killed and the tread pattern matched the shoes she was wearing when she was discovered.

The other set of tracks lead detectives to a bushy area approximately 100 yards behind Carol's home. There, bicycle tire tracks were also found. It appeared that the rider had traveled on the bike from the trailhead at Glenshandra to the bushy area, left the bike and continued on foot towards Carol's home. Those same tracks could be seen going away from the home back toward the bike. The impression left by one of the tires led law enforcement to believe the tire that made it was flat. While the State has been unable to match the shoe

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tracks to any of the shoes recovered from Defendant, the tire tracks are consistent with the tires on Defendant's mountain bike, including the flat rear tire.

Defendant attempts to muddy the waters by comparing apples to oranges and splitting grammatical hairs. Detective McDormett's testimony that there was an absence of other impressions referred primarily to the area behind Carol's home. The statements made by Deputy Taintor and Sergeant Acton that there were numerous tracks referred to the trailhead at Glenshandra. It is clear that Detective McDormett's testimony on this issue was a fair representation of the evidence.

Defendant cries foul over Detective McDormett's use of the word "consistent" to describe the scientific comparison between the photographs taken of the tire tracks and the actual tires from Defendant's mountain bike. The report states that "[s]imilar tire tread patterns exist between the tire tracks depicted in the images ... and the front and rear bicycle tires ...." (Bates No. 000311). According to *Merrium-Webster's Collegiate Dictionary*, one would be "consistent" to another if the two were "marked by ... regularity" and showed "steady conformity to character." 266 (11th ed. 2004). Items are "similar" if they have "characteristics in common" or are "strictly comparable" and "alike in substance or essentials." *Id.* at 1161. Clearly, these words are synonymous and Detective McDormett's use of one instead of the other was not an error.

Defendant's request for remand based upon the State's failure to inform the grand jury that he owned a pair of shoes designed to be worn while riding the mountain bike and that those shoe prints were not found is ludicrous. Had the bike design been such that it could not be ridden without the shoes, the fact would have weight. Otherwise, it is simply not relevant to the grand jury's finding of probable cause in this matter. The request for

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remand based on these issues should be denied.

E. The murder weapon.

The cause of Carol's death was "multiple blunt force craniocerebral injuries." It was determined that Carol's injuries were caused by a minimum of seven blows which left her skull in over fifty pieces. In the autopsy report Dr. Keen, the medical examiner wrote: "The skull is repositioned and comparison of the contours of the fractures to the surface of a golf club driver with remarkable similarities noted. Similarly the patterned rod-like contusions of the right forearm are consistent with the shaft of a golf club." Report of Autopsy, dated July 3, 2008, Page 9, ¶ 11.

Defendant is a golfer. During the execution of the first search warrant, law enforcement observed a set of golf clubs in a golf bag and a golf club cover on a shelf near the bag in Defendant's Alpine Meadows garage. The cover was designed to fit a Callaway Big Bertha Steelhead driver. No "wood" type club in the bag was missing a cover. Once the cause of death was determined, another search warrant for the Alpine Meadows residence was issued. The cover was gone and some of the shelves had been straightened. No club matching the cover has been recovered.

Law enforcement learned through persons close to Defendant that he gave a golf club to Carol to sell in a yard sale she was planning. No one could identify the type of club but it is believed Defendant delivered it to Carol's home about a week before she was murdered. No golf club was found at Carol's home.

Dr. Laura Fulginiti compared the skull fractures to the surface of a Callaway Big Bertha Steelhead III, No. 7 Wood, which had been purchased by law enforcement specifically for comparison. Dr. Fulginiti stated that the club could not be ruled out as the

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cause of death (Bates No. 000548-49), and in a conversation with Detective McDormett on October 14, 2008, stated that the club would be consistent with having caused the injuries. Dr. Fulginiti also suggested that additional testing be performed.

The golf club cover was eventually found in the possession of Defendant's attorney. Defendant claimed he had found the cover in the back seat of one of his girlfriend's car, he stated he thought the wind might have blown it there, and surrendered it to his attorney because, he claimed, he had overheard law enforcement speaking about its importance to the case.

F. Defendant's reactions.

Defendant claims that even though his ex-mother-in-law had called in a panic because she could not reach Carol, he did not want to go to check on her because there might be another man at the residence and he did not want to intrude. This does not ring true. First, Defendant had communicated with Carol earlier in the day about going out to pick up their oldest daughter's car. Second, consider Defendant's statement that he loved Carol. When one learns that a loved one might be hurt or in danger, any reasonable person would take whatever actions necessary to dispel the concerns. It is disingenuous to claim to love someone yet refuse to risk slight embarrassment to ensure that loved one's safety.

There is no doubt that each of us reacts differently to tragedy; however, Defendant's initial reactions and statements were highly unusual. Defendant, not willing to go Carol's house himself, sent his 16 year old daughter and the daughter's boyfriend instead. His statement that perhaps Carol was just screening her calls lacks credibility. Carol was very close to her mother and spoke to her regularly. After an unexpected disconnect, it is highly unlikely that Carol would purposely avoid answering her mother's calls or those of her

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brother and daughter.

When Defendant learned that Carol was dead, one of the first questions he asked was regarding the condition of the body. Once it was determined the Carol had been killed, Defendant stated he wanted to help but voiced overriding concerns that he had to go to work the next morning and falsely claimed that he alone would man the office the next day. While none of these statements or reactions taken alone fully implicates Defendant, when considered with the other evidence, stand to support the State's theory that Defendant committed the crimes.

Defendant would have the Court believe that all of this evidence is irrelevant, misleading and prejudicial. He claims the State does not know if a golf club was the murder weapon and that it has not followed Dr. Fulginiti's advice to do further testing. Furthermore Defendant claims that the theories offered by the State are unsupported and biased and remand is required to address the multiple violations. Defendant's offerings should be recognized for what they are; a challenge to the nature and sufficiency of the evidence and a demand that in this case, the standard for indictment by the grand jury should be greater than that set by law.

The only role of the grand jury is to determine whether probable cause exists to believe that a crime has been committed and that the person being investigated committed it. Rule 12.1(d)(4), *Arizona Rules of Criminal Procedure*. As the Arizona Supreme Court stated in *Trebus v. Davis,* 189 Ariz. 621, 625, 944 P.2d 1235, 1239 (1997):

> We believe, however, that issues such as witness credibility and factual inconsistencies are ordinarily for trial. *See Mauro,* 139 Ariz. at 425-26, 678 P.2d at 1389-90 (exploring insanity defense not well suited to primary function of grand jury and is best left for petit jury). The grand jury's primary function is to determine "whether probable cause exists to believe that a

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> crime has been committed and that the individual being investigated was the one who committed it." *State v. Baumann,* 125 Ariz. 404, 408, 610 P.2d 38,42 (1980). ***Simply put, the grand jury is not the place to try a case.***

(emphasis added).

If Defendant's request for a new finding of probable cause is granted, the State will, for all intent and purposes, be required to try this case before the grand jury. As stated in *Trebus,* this is not appropriate.

II. The State is not obligated to present all evidence to the grand jury; only that which is clearly exculpatory.

Defendant claims the State failed to present "significant exculpatory forensic evidence" because it did not tell the grand jury about each and every instance where evidence was tested for DNA, blood or fingerprints and the results were inconclusive or failed to implicate him. The State "is not obligated to present all exculpatory evidence to the grand jury ... but must present only 'clearly exculpatory' evidence." *Trebus v. Davis,* 189 Ariz. 621, 625, 944 P.2d 1235, 1230 (1997) (quoting *State v. Coconino County Superior Court,* 139 Ariz. 422, 678 P.2d 1386 (1984)). "Clearly exculpatory evidence is evidence of such weight that it might deter the grand jury from finding the existence of probable cause," *id.*, however inconclusive scientific comparisons are not material to the finding of guilt or innocence. *See Aldrick v. Bock,* 327 F.Supp. 2d 743 (E.D. Mich. 2004) (inconclusive tests are not material); *Blaggett v. Texas,* 110 S.W.3d 704, 806 (2003) (DNA tests which were inconclusive do not establish a reasonable pattern of innocence); *Rivera v. Texas,* 89 S.W.3d 55, 60 (2002) (while the presence of DNA could indicate guilt, the absence of such DNA would not indicate innocence).

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A. The telephone, the light bulbs and the door handle.

Defendant submits that the inconclusive results from testing of the telephone, light bulbs, and door handle are exculpatory. Simply stated, Defendant is wrong. "Inconclusive results indicate the DNA testing could neither include nor exclude an individual as the source of biological evidence." President's DNA Initiative, *Advancing Justice Through DNA Technology*, *available at* http://www.dna.gov/audiences/victim/know/interpreting (last visited Dec. 31, 2008.) Because the inconclusive DNA results do not exclude Defendant, it cannot be considered "clearly exculpatory" evidence. Also, the lack of a suspect's fingerprints is not necessarily indicative of innocence but can show planning and premeditation. Clearly, the State committed no error as to testimony given on the telephone, the light bulbs, or the door handle.

B. The fingerprint on the magazine.

Defendant claims that the State erred by failing to inform the grand jury that the fingerprint of James Knapp was discover on a magazine in Carol Kennedy's home. Again Defendant's claim that this fact is somehow exculpatory stretches the legal imagination too far.

Detective Brown told the grand jury of the relationship between Carol and James Knapp. He explained that Carol and Knapp had a platonic relationship and that Knapp lived in the guest house on Carol's property. Detective Brown also explained that Knapp would occasionally be in and out of Carol's home to care for the animals and, more importantly, Detective Brown informed the grand jury that Knapp's whereabouts at the time of Carol's murder had been fully verified. That Mr. Knapp's fingerprint was found on a magazine in the home has no affect whatsoever on the grand jury's finding of probable cause against

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Defendant in this matter.

C. Unidentified male DNA profile from material found under the Carol's fingernail.

The only full DNA male profile recovered from the scene was found on clippings from Carol's fingernails on her left hand. The DNA does not match any known samples, including that of Defendant. It is important to note that all of Carol's defensive wounds were on her right side. One of her fingernails on her right hand was broken, however no foreign DNA was discovered on that nail or hand.

One possible source of that DNA is the clippers that were used on Carol's fingernails during the autopsy. During a conversation with Karen Gere of the Yavapai County Medical Examiner's Office, Detective Brown learned that clippers were not "single use" but would usually be cleaned after being used. However, if the clippers had not been thoroughly scrubbed, cellular material of another person could have contaminated the samples. Detective McDormett gave testimony regarding this possible source at grand jury. Despite Defendant's protestations to the contrary, this information is not false or misleading and does not warrant remand for a new finding of probable cause.

CONCLUSION:

It is true that the murder weapon has not been discovered. It is also true that no direct evidence has been found which places Defendant in the house on the night of the murder; however, the circumstantial evidence against Defendant is overwhelming. The fact is Defendant had both the motive and opportunity to kill Carol. The physical evidence, the bicycle tracks, found behind Carol's house are consistent to those made by Defendant's tires. This evidence was presented in a fair and impartial manner to the grand jury and, based on those facts, the grand jury determined there was probable cause to believe Defendant had

entered Carol's home while she was out running and committed the vicious act which left Carol dead and her skull in over fifty pieces. The grand jury then issued a valid Indictment charging Defendant with 1st Degree Burglary and 1st Degree Murder. Defendant's claim that he was denied substantial procedural rights is clearly without merit; therefore, his request for a New Finding of Probable Cause should be denied.

Respectfully submitted this 6th day of January, 2009.

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By _____
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